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Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime
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Items 3 and 4 of the provisional agenda*
Consideration of the draft United Nations Convention against Transnational Organized Crime, with particular emphasis on articles 1-3
Consideration of the additional international legal instrument against trafficking in women and children

Proposals and contributions received from Governments

Addendum

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*A/AC.254/10.

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I. Introduction

1. The Secretary-General has the honour to bring to the attention of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime comments and proposals that relate to the draft United Nations Convention against Transnational Organized Crime or the additional international legal instrument against trafficking in women and children. The comments and proposals have been submitted by Governments since the convening of the first session of the Ad Hoc Committee, which was held in Vienna from 19 to 29 January 1999.

2. Any proposals or contributions received subsequently will also be issued as addenda.

II. Proposals and contributions received from Governments

Australia*

[Original: English]

Suggested assumptions and understandings concerning the additional international legal instruments

The following points are submitted for purposes of discussion and consultation. The points are not intended for inclusion as treaty text, although if appropriate points (a)(i) and (ii) could be reflected in the draft Convention:

(a) Instrument prepared as an "optional protocol"

(i) A Party to the Protocol must also be a Party to the Convention;

(ii) A Party to the Convention is not bound by the Protocol unless the Party has expressly accepted the Protocol;

(iii) Except where necessary for convenience of drafting, the Protocol should not duplicate obligations already existing in the Convention;

(iv) The Protocol must be consistent with the Convention. The Protocol should not affect obligations existing under the Convention (although it might add to them for Parties to the Protocol);

[Note. The issue of reservations to the Convention or to the Protocols is a separate matter.]

(v) The Protocol may deal with the following matters, among others:

a. Adoption of special measures not contained in the Convention, relating to particular kinds of criminal activity;

b. Measures with respect to kinds of criminal activity not covered by the Convention for any reason, for example, the organizing, or participating in, a relevant crime by an individual and not necessarily involving an organized criminal group;

* Previously issued as document A/AC.254/L.9.

(vi) As far as practicable, all Protocols should follow a common format, where necessary adopting Convention provisions by reference. Provisions of similar effect should be drafted in the same form;

(b) Instrument prepared as a "non-optional protocol"

This would really be part of the Convention, and would be prepared and have effect accordingly;

(c) Instruments prepared as a separate treaty

Points (a)(i)-(vi) would not apply. However, for the purpose of the current work any instrument designed as a separate treaty would need to be consistent with the Convention, and designed so as to be able to function if a Convention Party was not also a treaty Party, and vice versa.

[Original: English]

Proposals on articles 13, 18 and 18 *bis* of the draft United Nations Convention against Transnational Organized Crime

1. During the first session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, the delegation of Australia undertook to develop proposals regarding the matters presently dealt with in articles 13, 18 and 18 *bis* of the draft United Nations Convention against Transnational Organized Crime.

2. The proposal outlined below with respect to article 13, entitled "Consideration of requests for extradition",[1] would involve deleting that article and adding the following paragraph at the end of article 10:

"Each State Party shall designate, by notification to the Secretary-General, an authority or, when necessary, authorities able to provide initial advice to another State Party in relation to a proposed extradition request, including advice with respect to the applicable procedures, channels and documentary requirements. The notification to the Secretary-General may include any further information that the notifying State Party might consider to be helpful. Designation of an authority for the purposes of this paragraph shall not be taken to affect the designation of competent authorities for the specific purpose of any bilateral extradition treaty or the possibility of initial communication in urgent circumstances through the channels of the International Criminal Police Organization.

3. The proposal outlined below with respect to article 18, entitled "Protection of witnesses and victims", and article 18 *bis*, entitled "Measures to enhance cooperation with law enforcement authorities", would involve replacing those articles with the following three articles:

"Article 18

"Special measures in relation to certain witnesses and informants

"1. States Parties shall adopt, as appropriate within the basic principles of their respective legal systems, measures designed to encourage the giving of relevant testimony and information in relation to the crimes covered by this Convention by persons able to do so.

[1] In the unrevised version of the draft Convention (A/AC.254/4).

"2. Such measures might include:

"(a) Establishing procedures for taking special measures to protect such persons, their relatives and relevant associates against potential retaliation or intimidation, such as, to the extent necessary and feasible, establishing new identities, relocating, and prohibiting disclosure of information about the identity and whereabouts of such persons;

"(b) Establishing procedures for giving evidence by electronic or other means so as to reduce the possibility of retaliation or intimidation, but not so as to prejudice the rights of the defence;

"(c) Giving assurances or conditional assurances, in special cases, that such persons will not be prosecuted for specified past conduct, either by formally granting immunity or indemnity or by giving assurances or undertakings by competent authorities;

"(d) Offering the possibility of reduced punishment of such persons, in special cases, through the proper exercise of any available discretion by the competent authority, either by charging less serious offences, recommending lower penalties or exercising powers to remit or reduce an imposed sentence;

"(e) Providing rewards.

"3. A State Party shall, on request, consider entering into arrangements with another State:

"(a) To facilitate the relocation of protected witnesses or informants and their relatives and the protection of their identities;

"(b) To receive from the authorities of one State the kind of assurances referred to in paragraph 2 (c) of this article for the purpose of obtaining the testimony of a witness from another State.

"*Article 18* bis

"*Protection of persons involved in investigations and prosecutions*

"States Parties shall consider taking appropriate measures to protect the safety of persons involved in the detection, investigation and prosecution of the crimes covered by this Convention, including, where necessary and appropriate, informants, witnesses, victims, investigators, prosecutors, advocates, magistrates, judges and court officials.

"*Article 18* ter

"*Victims*

"States Parties shall give consideration to the adoption of measures to be applied where there are identifiable victims of a crime covered by this Convention. Such measures might include:

"(a) Provision for the ordering or encouraging of restitution by offenders to victims;

"(b) Provision for the views and concerns of victims to be presented and considered at appropriate stages of the criminal proceedings, in a manner not prejudicial to the rights of the defence;

"(c) Other assistance to victims as might be appropriate in the particular case."

Australia and Canada

[Original: English]

Comments on the draft Protocol on Trafficking in Women and Children submitted by Argentina and the United States of America

We recognize an important distinction between the subject matter covered by an optional protocol on trafficking in human beings and that covered by an optional protocol on the smuggling of migrants.

The phenomenon of trafficking includes additional forms of criminal behaviour that need to be addressed, including:

(a) Coercion, fraud, kidnapping, and "sale" prior to the movement of a person across international borders;

(b) Criminal exploitation in the country of destination, including sexual exploitation such as forced prostitution or child pornography;

(c) Forced labour, having due regard to existing international definitions such as that contained in Forced Labour Convention, 1930, of the International Labour Organization (ILO). In that connection, we have an open mind as to the expansion of the protocol beyond women and children provided that emphasis is maintained in respect of the special circumstances of both women and children;

(d) Conduct in broker countries.

With respect to issues pertaining to the illegal transport, movement and entry of trafficked persons, we should consider the inclusion of relevant provisions for the control of smuggling of migrants.

The heinous exploitation of victims of trafficking requires special measures to address their needs, as otherwise prosecution would be difficult and could lead to re-victimization. Such measures should include:

(a) Consideration by the receiving State of humanitarian and compassionate factors in the determination of the victim's status in that State;

(b) Facilitation of the return of the victim where returning the victim is not inconsistent with other international legal obligations;

(c) Assistance and protection for victims who are witnesses in criminal proceedings against traffickers, including measures that bear in mind the sensitivities surrounding sexual exploitation. In that regard, there could be recourse to protective measures outlined in the rules of procedure and evidence of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991;

(d) Victim rehabilitation in either the country of origin or the receiving country, as applicable.

We would wish to ensure that all provisions are consistent with the international human rights instruments, including the Convention on the Rights of the Child (annexed to General Assembly resolution 44/25 of 20 November 1989). We would recommend inclusion of provisions on the human rights of detainees and a savings clause concerning human rights instruments and the Convention relating to the Status of Refugees,[1] as submitted by Canada in respect to the migrant smuggling protocol.

Law enforcement and cooperation provisions (e.g. technical assistance, asset seizure, information exchanges) should be included only insofar as they go beyond those contained in the main Convention.

The drafters should take into account work being done in other international forums (the proposed ILO convention concerning the prohibition and immediate elimination of the worst forms of child labour and the Commission of Human Rights working group on an optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography).

Austria

[Original: English]

Non-paper on article 23 of the draft United Nations Convention against Transnational Organized Crime

1. Article 23, option 1, seeks to set up the Commission on Crime Prevention and Criminal Justice as the body to oversee the implementation of the Convention.

2. Austria does not believe that this is desirable or practical:

(a) The Commission on Crime Prevention and Criminal Justice is a functional commission of the Economic and Social Council, established by the Council in its resolution 1992/1, with limited membership (40 members elected for a term of three years: 12 from Africa, 9 from Asia, 4 from Eastern Europe, 8 from Latin America and the Caribbean and 7 from Western European and Other States) and with a limited mandate;

(b) The membership of the Commission will not coincide with the States Parties to the Convention;

(c) Decisions of the Commission are not legally binding; it would seem contrary to all institutional logic for the Commission, whose membership includes some States that may choose not to be bound by the Convention, to oversee the compliance with and/or implementation of the Convention by States Parties to the Convention.

3. Therefore, provisions should be made to ensure that only States that have chosen to be bound by the Convention monitor compliance with or implementation of the Convention.

4 This means that the Convention should set up its own conference of the Parties to the Convention, in keeping with well-established practice.

5. Article 23, option 2, is a step in that direction. Subparagraphs 2 (a) and (b) are very far-reaching, though. It might be more prudent to leave it up to the Conference of the

[1] United Nations, *Treaty Series*, vol. 189, No. 2545.

Parties to the Convention to determine its own goals and working methods. Furthermore, paragraph 5 is impractical (since the voluntary contributions cannot be foreseen with certainty, there is no way to calculate how much must be paid by assessed contributions; hence, there is no way to bill the States in time etc.).

6. What was totally missing in the text laid on the table was the role of the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention.

7. In Austria's view, the Centre for International Crime Prevention would have several important functions:

(a) It should act as the secretariat of the Convention and its Protocols and should service the meetings of the Conference of the Parties to the Convention; that would also allow maximum synergy between the work of the Crime Commission and the work of the Conference;

(b) The Centre for International Crime Prevention would also be the entity to carry out the activities proposed by the Netherlands in document A/AC.254/L.3 under the heading "Additional paragraph of article 23", which Austria supports, and any other analytical work and technical assistance that might be decided upon in the context of the Convention.

Japan

[Original: English]

Proposals on article 3 (option 2) of the main Convention as presented in document A/AC.254/L.1/Add.2

1. Japan would like to present proposals on article 3, which is one of the most important and challenging articles in the draft Convention: important because this article, by imposing legal obligations on the contracting Parties to criminalize participation in a criminal organization, will provide effective measures in combating organized crime; and challenging because the introduction of the offence of participation is closely related to the basic principles of the domestic legal system of each State.

2. The difficulty in introducing an obligation to criminalize the act of participation can be seen in the two options to article 3 themselves. Both provide two options in criminalizing the conduct, one based on the notion of conspiracy in the common law system and the other based on the notion of participation found in the civil law system.

3. However, in order to make this Convention as global as possible, the obligation stipulated in this article should also be acceptable to other legal systems in the world. In addition, this article should have some nexus to the notion of "organized crime" or "organized criminal group" to be defined in article 2 and article 2 *bis*.

4. This proposal is made in the light of the above consideration and based on option 2 of article 3, which was proposed by the United Kingdom of Great Britain and Northern Ireland. Japan believes that the revisions of option 2 presented below are essential and minimum requirements for the obligation in this article to be acceptable to other legal systems in the world.

5. Subparagraph 1 (b) of article 3 introduces a legal obligation to criminalize the act of "participation". As stated above, the criminalization of "participation" is closely related

to the basic principles of the domestic legal system of each State. For example, under the basic principles of Japanese criminal law, certain acts are punishable only when the crime in question is actually committed or attempted, and conspiracy or preparatory acts are punishable only in certain grave crimes. Thus, it is inconsistent with our legal principle to criminalize the acts of conspiracy and preparation of all serious crimes. Furthermore, our legal system does not have any provision which criminalizes acts of participation in certain criminal groups without any relevance to the commission of a concrete crime. Therefore, the obligation to criminalize the acts of "participation" should be realized within the framework of the fundamental principles of the domestic legal system.

6. Thus we propose to insert the phrase "Subject to the fundamental principles of its domestic legal system" between subparagraphs 1 (a) and (b) of article 3.

7. Subparagraph 1 (b) (i) of article 3 refers to the criminalization of "conspiracy" to commit a "serious crime", which is defined in subparagraph (b) of article 2 *bis* as conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least [...] years. Since the scope of this Convention should include some element related to "organized criminal activity", there should be some limitation to this provision in order to make it relevant to such an element. For the time being, such an element could be found in paragraph 1 of article 2 of the draft Convention, i.e. "serious crime involving an organized criminal group as defined in article 2 *bis*" as well as in subparagraph 1 (a) of article 3.

8. Thus, we proposed to insert the phrase "involving an organized criminal group" after the phrase "a serious crime" in the first line of the English text in subparagraph 1 (b) (i) of article 3, with the possibility of changing the phrase in accordance with the future development in the drafting of paragraph 1 of article 2.

9. Our basic position is that the notion "involving an organized criminal group" should mean activities conducted as part of the activities of a group having as its aim the commission of a serious offence and utilizing the structure of such a group.

10. Subparagraphs 1 (b) (i) and (ii) are drafted so as to introduce offences within the framework of either the common law system or the civil law system. In order to make this Convention globally acceptable, we believe that a third option, to criminalize the acts of "participation", should be introduced, taking into account the fact that the legal systems in the world are not limited to these two systems.

11. Thus, we propose, as a basis for discussion, to add the following new subparagraph to subparagraph 1 (b) of article 3:

> "(iii) Participation in acts of an organized criminal group which has the aim of committing a serious crime, in the knowledge that the person's participation will contribute to the achievement of the crime."

12. Accordingly, we proposed to change the first three words in the chapeau of subparagraph 1 (b) from "Either or both" to "At least one".

Mexico*

[Original: English and Spanish]

Proposals on articles 1-3 of the draft United Nations Convention against Transnational Organized Crime

Article 1

Statement of objectives

The purpose of this Convention is to promote cooperation among the States Parties so that they can prevent and combat transnational organized crime more effectively.

Article 2

Scope of application

This Convention shall apply to the prevention, investigation and prosecution of crimes of a transnational character committed by criminal organizations and considered as serious in accordance with the national legislation of each State Party, such as:

(a) Illicit production, trafficking and distribution of narcotic drugs or psychotropic substances, as defined in pertinent conventions of the United Nations;

(b) Traffic in persons, as defined in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, of 1949,[1] including illicit traffic in women and children, and also traffic in organs;

(c) Illicit traffic in migrants;

(d) Counterfeiting currency, as defined in the 1929 International Convention for the Suppression of Counterfeiting Currency;[2]

(e) Illicit traffic in or stealing of cultural objects, as defined in the pertinent conventions;

(f) Stealing of nuclear material, its misuse or threat to misuse, as defined by the 1980 Convention on the Physical Protection of Nuclear Material;[3]

(g) Terrorist acts as defined in the pertinent international conventions;

(h) Illicit manufacturing of and trafficking in firearms, ammunition, explosives and other related materials;

(i) Illicit traffic in or stealing of motor vehicles;

(j) Corruption, as defined in international conventions on the subject;

(k) Illicit access to computer systems and equipment.

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* Previously issued as document A/AC.254/L.8.

[1] Resolution 317 (IV), annex.

[2] League of Nations, *Treaty Series*, vol. 112, No. 2623.

[3] United Nations, *Treaty Series*, vol. 1456, No. 24631.

Article 3

Definitions

It is understood that transnational organized crime exists when three or more persons agree to organize or are organized, on a permanent or recurrent basis, to commit acts that in themselves or when combined with others have as an objective or result the commission of a crime or crimes that are identified in article 2 and over which two or more States Parties have established their jurisdiction, in accordance with article 9 of this Convention.

Poland

[Original: English]

Comments and proposals concerning the relationship between the draft United Nations Convention against Transnational Organized Crime and its Protocols

1. Since there is rather wide acceptance of having additional international instruments annexed to the United Nations Convention against Transnational Organized Crime, the relationship between the Convention and those instruments must be precisely defined in the text of the Convention. Having this in mind, Poland fully supports the suggestions made by Australia (A/AC.254/L.9) on the instruments described in "point (a)" as optional protocols.

2. However, Poland cannot agree to any differentiating between those instruments, especially concerning their relationship with the Convention. In particular, the instruments should never be treated as separate treaties. Such differentiation would weaken the Convention and its practical importance and would be contrary to initial guidelines established for the discussions of the Ad Hoc Committee.

3. Consequently, all the instruments in question, though they may be called "optional protocols", should be treated as instruments annexed to the Convention that form an integral part of the Convention. That should be reflected in the draft Convention in addition to the two proposals by Australia (A/AC.254/L.9) that:

"(i) A Party to the Protocol must also be a Party to the Convention;

(ii) A Party to the Convention is not bound by the Protocol unless the Party has expressly accepted the Protocol."

4. The above-mentioned views could be reflected in the draft Convention by appropriately modifying its provisions dealing with "Signature, ratification, accession and reservations" (article 26) and "Entry into force" (article 27). Poland would like to suggest the consideration of a solution adopted in the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.[1] Following the example of article 4 of the Convention on Certain Conventional Weapons, it would be possible to include in the text of article 26 of the draft Convention (after the necessary adjustment of the title of the article) the following provisions:

[1] United Nations, *Treaty Series*, vol. 1342, No. 22495.

"2. The present Convention is subject to ratification, acceptance, approval or accession. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.

"3. Expression of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State Party to this Convention.

"4. At any time after the deposit of its instrument of ratification, acceptance, approval or accession, a State may notify the depositary of its consent to be bound by any of the annexed Protocols.

"5. Any Protocol by which a State Party is bound shall, for that State Party, form an integral part of this Convention."

5. This option would give States Parties the freedom to choose from among the Protocols those by which they wish to be bound. It would also eliminate the need to have specific provisions in each Protocol that deal with expressing consent to be bound by that Protocol or with its entry into force. Instead, it would be possible to insert in the draft Convention a general, unified formula (following the example of articles 4 and 5 of the Convention on Certain Conventional Weapons) for the notification by States Parties to the Convention of their consent to be bound by the Protocols. Provisions concerning the entry into force of the Convention and its annexed Protocols should be modified accordingly and should be contained only in the text of the Convention itself.